IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO.1609 OF 2003
IN
SUIT NO.1517 OF 2003

Arundhati Hiralal Nanavati & Ors. ...Plaintiffs
Vs.
Phiroza A. Antia also known as
Piroja A. Antia & Ors. ...Defendants

Mr.Pravin Diwan with Mrs. U.K.Shah i/b. Mr. K.D.Shah for Plaintiffs
Mr.K. Setlwad i/b. M. Sethna for Defendants

CORAM: SMT.R.S.DALVI,J.
DATED: 5TH AUGUST, 2005

P.C.

1. The Plaintiffs have sued for a declaration that Defendant No.1 is liable to indemnify the Plaintiffs in relation to the flat purchased by them from the Defendants, consequent upon the decree being passed by the Small Causes Court in a suit filed in that Court being Suit No.398/1186 of 1981 and for other incidental reliefs.

2. The suit is filed upon the Memorandum of Understanding (MOU) dated 26th July, 1997 executed by and between the parties. Under clause 15 of the said MOU the Defendants as the transferors indemnified and agreed to indemnify the Plaintiffs as transferees against any claim or demand made by any one in respect of the flat agreed to be sold to the Plaintiffs.

3. The parties entered into a deed of sale there after on 30th November, 1997. The Plaintiffs came to be the owners of the suit flat pursuant to the said deed of sale for consideration.

4. Between the date of the execution of the MOU and the date of the execution of the sale deed the Plaintiffs must be taken to have made all requisite enquiries as to the marketability of the title of the Defendants as they deemed appropriate.

5. A suit in the Small Causes Court was filed since 1981 well before the transaction between the parties by the Lessors of the land on which the building for which the Plaintiffs purchased one flat against the lessee who was the Co-operative Society in which the Plaintiffs have purchased shares with regard to their flat. The suit is stated to have been filed for breaches of certain cavenants by the lessee i.e. the Society. The suit came to be decreed on 22nd January, 2002. An appeal filed therefrom by the Society is pending. It is the Plaintiffs' case that consequent upon the decree by the trial Court a claim must be taken to have been made upon the Plaintiffs by the Lessors, and the indemnity given by the Defendants becomes executable.

6. The Plaintiffs have sued for declaration of

their right under the said clause and as a consequent relief for a mandatory order against Defendant No.1 to ensure that the Lessor withdraws the suit or does not execute the decree or that the Defendants deposit all the amounts paid by the Plaintiffs as aforesaid along with interest at the rate of 18% p.a. from the date of the execution of the MOU itself.

7. In this Notice of Motion the Plaintiffs claim the relief that the Defendants must see the Lessors of the land (who are the Plaintiffs in that suit) withdraw the suit or ensure that the decree passed is not executed in respect of the Plaintiff's flat or in the alternative Rs.3,71,10,580/- be paid to the Plaintiffs by way of compensation after the decree is executed and the Plaintiffs lose possession of the suit flat. The Plaintiffs further claim interest upon the principal amount paid by them in respect of the suit flat

8. The particulars of the Plaintiffs claim in suit Exhibit-D to the Plaint shows the claim for the Earnest amount paid since 26th July 1997, the date of the execution of the MOU, the balance amount of consideration as the purchase price, incidental expenses being the stamp duty, society transfer charges, renovation expenses, brokerage aggregating to Rs.1,85,92,000/-. The Plaintiffs claim interest at the rate of 18% p.a. on the said amount till the

filing of the suit which interest amount itself aggregating to Rs.1,85,18,580/-. Hence, the total amount claimed in suit upon the enforcement of the indemnity given by the Defendants is Rs.3,71,10,580/-.

9. It must be seen under what circumstances and from what time clause 15 of the MOU would become operative. It may at once be stated that the MOU is one of the terms of the agreement in respect of the suit flat between the parties. It is later replaced by the Deed of Sale under which the balance consideration of Rs.1.36 crores is paid. It therefore, merges with the deed of sale. Between the two dates of the parties agreeing to sell and in fact the executing the sale deed, they are required, as per law, to take whatever inspection of the records as are be available to them and searches as they are required to make for determining and satisfying themselves about the marketability of the title of the property agreed to be sold to them. Nevertheless clause 15 of the MOU shows an indemnity given by the Defendants only against any claim or demand made by some one else upon the Plaintiff in respect of the property to be sold. No such demand or claim is made by any one upon the Plaintiffs yet. What is stated to be the demand or claim is the suit already filed 16 years before the document was executed. That demand or claim in the suit is by the Lessor upon the Lessee. It is not by either the Lessor or the Lessee upon the Plaintiff.

The Plaintiffs would have a cause to file an action in law if a claim is made upon them. They can have no right to sue pursuant to a claim made by one party upon another if it is not made upon the Plaintiffs. The claim, if any, would be made pursuant to the suit being filed only after the final judgment and order is obtained in that suit by the Plaintiffs therein. The passing of the decree by the trial Court is not a final judgment or order. It is subject to a first appeal by way of right. That right has been exercised and has been pending hearing. The claim or demand is far from being made. In any event such a claim or demand is upon the entire property of the society who is the Lessee of the land and who is the Defendant in that suit. Such a claim or demand can be satisfied by the Defendant in that suit either in execution of a decree or by a prior settlement. If that is done, no individual claim or demand upon the Plaintiffs, or upon any other flat owner could be made. Only if that is not done and the final judgment or decree, after all the rightful appeals have been exhausted, is sought to be executed, can an individual demand or claim be made upon the Plaintiffs. In that event clause 15 can be invoked by the Plaintiffs. The Defendants would then have to indemnify the Plaintiffs to the extent of that claim.

10. The Plaintiffs have invoked that clause much too early. They contend that the first decree

constitutes such a claim or demand notwithstanding the fact that it is yet not made upon them.

11. The Plaintiffs claim is not only premature but far fetched.

12. Even upon the claim being made, the Plaintiffs have to call upon the Defendants to indemnify them. The Defendants would be entitled to indemnify the Plaintiffs in any lawful manner so as to see that no loss is caused to the Plaintiffs pursuant to the execution of the document between them. It need not necessarily be by payment of all the expenses relating to the flat purchased by the Plaintiffs under the assurances of that indemnity and interest at the rate determined by them.

13. The Defendants' Advocate has drawn my attention to the Judgment in the case of Shankar Nimbaji Shintre Vs. Laxman Supdu Shelke reported in AIR 1940 Bombay 161 in which the ambit of Section 124 of the Indian Contract Act relating to the contract of indemnity is specified. Under such a contract the promisor (the indemnifier-in this case the Defendant) is required to save the promisee (the person indemnified - in this case the Plaintiffs) from the loss caused by the conduct of himself or another.

14. The loss is therefore a condition precedent.

In this case the loss will be caused by the claim made by the Society. It is only upon the claim made that the cause of action can accrue. In that case the action filed earlier was held to be premature. It was held in that case that the cause of action arose when the damage, which the indemnity intended to cover, was suffered and the suit brought before the actual loss occurred must be thrown out as premature. The Plaintiffs suit is one such.

15. Even in the case of Lala Shanti Swarup Vs. Munshi Singh reported in AIR 1967 Supreme Court, 1315 (V 54C 273) it has been held that for a contract under Section 124 of the Indian Contract Act, the suit must be based upon the claim for the Plaintiff to be indemnified. The cause of action in such a suit arose when the Plaintiffs are actually damnified. It is observed in that judgment that the mere fact that a mortgage decree has been obtained against the Plaintiff is not sufficient to put the statute in motion, and that no action can be brought until the loss has been suffered.

16. The Plaintiffs have relied upon a judgment of the Division Bench of this Court in Appeal No.702 of 2003 in Suit No.3092 of 2002. That was not a case of sale under the contract of indemnity but in which various factors were considered. However, in this case the Plaintiffs' claim upon the contract of

indemnity can be made only when a claim is made upon the Plaintiff.

17. In view of such a legal position. Notice of Motion is dismissed. NOC.

(SMT. R.S. DALVI,J)